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8 UNITED STATES OF AMERICA

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10 UNITED STATES DISTRICT COURT  
11 FOR THE CENTRAL DISTRICT OF CALIFORNIA

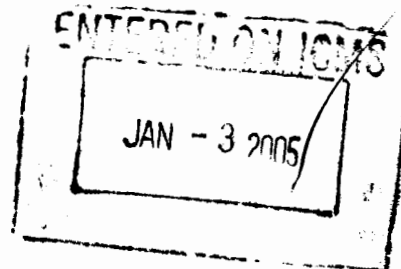
12 UNITED STATES OF AMERICA, ) No. CR 04-615-CBM  
13 Plaintiff, )  
14 v. ) GOVERNMENT'S RESPONSE TO PRE-  
ANDREW K. PROCTOR, ) SENTENCE REPORT FOR DEFENDANT  
15 Defendant. ) ANDREW K. PROCTOR  
16 ) Sentencing Date: January 10, 2005  
17 ) Sentencing Time: 1:30 p.m.  
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19 Plaintiff United States of America, by and through its  
20 counsel of record, the United States Attorney for the Central  
21 District of California, hereby submits its response to the Pre-  
22 Sentence Report for defendant Andrew K. Proctor.

23 This response is based on the attached Memorandum of Points  
24 and Authorities, the files and records of this case, and any  
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1 other evidence and argument that the Court may wish to consider  
2 at the sentencing hearing.

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4 Dated: December 29, 2004

Respectfully submitted,

5 DEBRA W. YANG  
United States Attorney

6 STEVEN D. CLYMER  
7 Special Assistant United States  
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Chief, Criminal Division

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10 JEFFREY A. BACKHUS  
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I.

GOVERNMENT'S RESPONSES TO DEFENDANT'S FACTUAL CORRECTIONS TO PSR

As an initial matter, defendant's factual objections largely should fail because they are unsupported by the record. "The presentence report is considered reliable evidence for sentencing purposes." United States v. Clark, 139 F.3d 485, 490 (5th Cir. 1998). As a consequence, "a defendant cannot show that a PSR is inaccurate by simply denying the PSR's truth; rather the defendant must produce some evidence that calls the reliability or correctness of the alleged facts into question." United States v. Willis, 300 F.3d 803, 807 (7th Cir. 2002); United States v. Jefferson, 258 F.3d 405, 413 (5th Cir. 2001) ("If no relevant affidavits or other evidence is submitted to rebut the information contained in the PSR, the court is free to adopt its findings without further inquiry or explanation"). Because defendant's objections are largely unsupported, his objections must fail.

A. PARAGRAPHS 3, 16 & 79

Defendant argues that the PSR incorrectly states that co-defendant Lemmon was sentenced to 21 months incarceration as to Count 1. (Defendant's Position Re: Sentencing Factors ("Def.'s Position"), at p. 5.) Defendant also argues that Case No. 02-80086 filed in the Southern District of Florida, was dismissed on May 28, 2004. (Def. Position, at p. 6, 8.) However, these factual corrections/objections are irrelevant and "not important to the sentencing determination" and should be disregarded and/or overruled. U.S.S.G. § 6A1.3(a).

1 B. PARAGRAPH 18

2 Defendant's correction/objection to Paragraph 18 of the PSR  
3 is irrelevant and "not important to the sentencing determination"  
4 and should be disregarded and/or overruled. U.S.S.G. § 6A1.3(a).

5 C. PARAGRAPHS 28 & 29

6 Defendant claims that the "summary" of the offense contained  
7 in paragraphs 28-29 contains information that is improper under  
8 Blakely v. Washington, 124 S.Ct. 2531 (U.S. June 24, 2004), and  
9 United States v. Ameline, No. 02-30326, slip op. (9th Cir. July  
10 21, 2004). See Blakely, 124 S. Ct. at 2538 n.9 ("[t]he Federal  
11 Guidelines are not before us, and we express no opinion on  
12 them"). Nevertheless, in United States v. Ameline, No. 02-30326,  
13 slip op. (9th Cir. July 21, 2004), a divided panel of the Ninth  
14 Circuit held that Blakely required the vacation of a Guideline  
15 sentence in which the sentencing judge had determined the  
16 applicability of disputed enhancements, and the circuit remanded  
17 for the convening of a sentencing jury, if necessary.

18 While this Court is bound by Ameline, the issue of whether  
19 Blakely applies to the Guidelines has not been finally resolved.  
20 The federal courts of appeals (like the Ameline panel) have  
21 divided on the matter, and, on August 2, 2004, the Supreme Court  
22 granted the government's petitions for writs of certiorari from  
23 decisions of the Seventh Circuit in United States v. Booker, 2004  
24 WL 1535858 (7th Cir. July 9, 2004), and the District of Maine in  
25 United States v. Fanfan, No. 03-47-P-H (D. Me. June 28, 2004).  
26 The government's petitions raise issues as to whether Blakely  
27 applies at all to the Guidelines, and, should Blakely be deemed  
28 applicable, whether its application means that the Guidelines

1 cannot be used at all (so as to permit sentencing within the  
2 statutory maximum and minimum sentences, with the Guidelines used  
3 as a reference guide).

4 The government maintains that Blakely does not apply to the  
5 United States Sentencing Guidelines and that sentencing can be  
6 conducted under the Guidelines, as it was before Blakely.  
7 Alternatively, the government maintains that should Blakely be  
8 held to apply to the Guidelines, and should defendant be  
9 unwilling to waive whatever rights he may have under Blakely with  
10 respect to determination of any contested fact that serves as the  
11 basis for either an increase in the defendant's Guideline range  
12 or an upward departure, then the parts of the Guidelines system  
13 rendered unconstitutional (judicial determination of the  
14 predicate facts that serve as a basis for applying the  
15 Guidelines) are inseverable from the Guidelines as a whole. The  
16 result would be that the Guidelines as a whole should be  
17 invalidated, and the Court would be able to impose any sentence  
18 between any applicable statutory mandatory minimum and the  
19 statutory maximum for all counts in the case. Even under this  
20 scenario, the government would recommend the sentence set forth  
21 below.

22 D. PARAGRAPHS 30-40, 48, 53 & 61

23 Defendant makes various unsupported factual  
24 corrections/objections to the above-referenced paragraphs.  
25 However, these factual corrections/objections are irrelevant and  
26 "not important to the sentencing determination" and should be  
27 disregarded and/or overruled. U.S.S.G. § 6A1.3(a). Moreover, "a  
28 defendant cannot show that a PSR is inaccurate by simply denying

1 the PSR's truth." Willis, 300 F.3d at 807. The Court may  
2 consider this information "so long as it has sufficient indicia  
3 of reliability to support its probable accuracy." U.S.S.G. §  
4 6A1.3(a); United States v. Petty, 982 F.2d 1365, 1369 (9th  
5 Cir.1993), amended on other grounds, 992 F.2d 1015 (9th  
6 Cir.1993), cert. denied, 510 U.S. 1040 (1994). Because  
7 defendant's objections are largely unsupported, his objections  
8 must fail.

9 E. PARAGRAPHS 99, 103 & 104

10 Defendant's corrections/objections to Paragraphs 99, 103 &  
11 104 are irrelevant and "not important to the sentencing  
12 determination" and should be disregarded and/or overruled.  
13 U.S.S.G. § 6A1.3(a). Based on the financial information provided  
14 by defendant, the government believes that defendant is capable  
15 of paying any fine within the applicable range.

16 II.

17 SENTENCING RECOMMENDATION AND CONCLUSION

18 The government hereby concurs with the findings and  
19 calculations contained in the PSR. However, the government  
20 believes that it is bound by the terms of the plea agreement.  
21 Therefore, pursuant to paragraph 17 of the plea agreement, the  
22 government recommends that the Court impose a low-end sentence of  
23 6 months imprisonment, to be followed by a term of supervised  
24 release as recommended by the USPO. The government also  
25 recommends that defendant be ordered to pay a fine in an amount  
26 acceptable to the USPO and a mandatory special assessment of  
27 \$100.


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1 The government also requests the opportunity to supplement  
2 its position on sentencing as may become necessary.

3  
4 Dated: December 29, 2004 Respectfully submitted,

5 DEBRA W. YANG  
6 United States Attorney

7 STEVEN D. CLYMER  
8 Special Assistant United States Attorney  
9 Chief, Criminal Division

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CERTIFICATE OF SERVICE

I, **PATRICIA BALDERAS**, declare:

That I am a citizen of the United States and resident or employed in Los Angeles County, California; that my business address is the Office of United States Attorney, United States Courthouse, 312 North Spring Street, Los Angeles, California 90012; that I am over the age of eighteen years, and am not a party to the above-entitled action;

That I am employed by the United States Attorney for the Central District of California who is a member of the Bar of the United States District Court for the Central District of California, at whose direction I served a copy of: GOVERNMENT'S RESPONSE TO PRE-SENTENCE REPORT FOR DEFENDANT ANDREW K. PROCTOR

**service was:**

☐ Placed in a closed envelope, for collection and interoffice delivery addressed as follows:

☒ Placed in a sealed envelope for collection and mailing via United States Mail, addressed as follows:

☐ By hand delivery addressed as follows:

☒ By facsimile as follows:

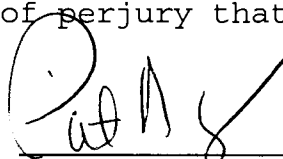
☐ By messenger as follows: ☐ By federal express as follows:

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Liner Yankelevitz  
Sunshine & Regenstreif LLP  
1100 Glendon Avenue, 14<sup>th</sup> Floor  
Los Angeles, CA 90024-3503

Steve Yung, USPO

This Certificate is executed on **December 29, 2004**, at Los Angeles, California.

I certify under penalty of perjury that the foregoing is true and correct.



**PATRICIA BALDERAS**